Perbadanan Kemajuan Kraftangan Malaysia v DW Margaret a/p David Wilson (t/a Kreatif Kraf)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02-(I)-11 OF 2009(W)
ZAKI AZMI CHIEF JUSTICE, JAMES FOONG AND HELILIAH FCJJ
24 DECEMBER 2009

Legal Profession — Practice of law — Right of audience — Whether advocates and solicitors precluded from appearing for Perbadanan Kemajuan Kraftangan Malaysia — Whether had locus standi to appear in civil proceedings — Whether only federal counsel and officers authorised by Perbadanan Kemajuan Kraftangan Malaysia's Chairman entitled to appear — Perbadanan Kemajuan Kraftangan Malaysia Act 1979 s 35 — Legal Profession Act 1976 s 35

Statutory Interpretation — Construction of statutes — Literal approach — Whether words or phrases ought to be considered first in their ordinary and natural meaning — Intention of legislation, approach to interpretation — Whether interpretation of one legislation to create precedent for interpretation of another legislation proper approach to construction of statutes — Perbadanan Kemajuan Kraftangan Malaysia Act 1979

Words and Phrases — 'may' — Perbadanan Kemajuan Kraftangan Malaysia Act 1979 s 35 — Whether word 'may' directory in nature

The plaintiff was a body corporate established under the Perbadanan Kemajuan Kraftangan Malaysia Act 1979 ('the Act'). The plaintiff had engaged the services of Messrs Zain & Co ('Zain') to act for it in a civil action and related proceedings against the defendant. In a contested application, the defendant's counsel objected to Zain's representation on the basis that Zain lacked locus standi to act as the plaintiff's solicitors in view of s 35 of the Act. The objection was overruled by the High Court but sustained by the Court of Appeal. The appellant was granted leave to appeal to the Federal Court. The Federal Court had to interpret s 35 of the Act in order to ascertain whether the plaintiff could engage private solicitors to act for it in civil proceedings.

Held, allowing the appeal with costs:

(1) (per **Zaki Azmi Chief Justice**) The plaintiff being a body corporate had

to be represented by an individual person. Section 35 of the Act is worded in such a way as to enable or empower an officer of the attorney general, such as a federal counsel to represent the plaintiff in any civil litigation. Without such a provision, the attorney general or his officers would not have the authority to do so (see para 4).

(2) (per **Heliliah FCJ**) The Federal Court could not agree that in the context of interpreting s 35 of the Act, recourse could only be made to the 'intention of the legislation' in order to discern its interpretation. Section 35 was the only provision that addressed the issue of legal representation in civil proceedings for or against the plaintiff. The other provisions of the Act elaborated or expanded on powers of the plaintiff to attain the objects and purposes for which it had been established (see paras 11–14); *Pinner v Everett* [1969] 1 WLR 1266 followed; *Vengadasalam v Khor Soo Weng & Ors* [1985] 2 MLJ 449 (SC); *Kumpulan Kamuning Sdn Bhd v Rajoo and 200 Others* [1983] 2 MLJ 400 (FC) and *Navaradnam v Suppiah Chettiar* [1973] 1 MLJ 173 referred.

(3) (per **Heliliah FCJ**) In the instant appeal, undue emphasis had been emplaced on the word 'may' in s 35 of the Act and on the term 'intention of the legislation' whereas scant regard had been paid to the opening words 'notwithstanding the provisions of any other written law' that also govern the application of the rest of s 35. The term 'notwithstanding' means generally 'not to stand against it', or 'in the way' or 'overriding'. There was also a need to read s 35 of the Legal Profession Act 1976 and to consider the words 'subject to this Act and any other written law' therein. The words 'subject to' and 'notwithstanding' were not to be interpreted *in vacuo* in the instant case (see paras 17, 20 & 23); *Union of India v IC Lala* (1973) 2 SCC 72; *Government of the Federation of Malaya v Surinder Singh Kanda* [1961] MLJ 121 and *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72 referred.

(4) (per **Heliliah FCJ**) Section 35 of the Act is a very specific section that enables the two categories of persons to appear on behalf of the plaintiff in civil proceedings but without imposing any interdiction on an advocate and solicitor to appear on behalf of the plaintiff. Whilst the plaintiff could resort to the two categories of persons to appear on its behalf, it is not precluded, from engaging the services of any advocate and solicitor. Section 35 of the Act has the effect of expanding the services of the office of the attorney general and facilitating an officer of the plaintiff to appear on its behalf. Without s 35 the two categories of officers would have no locus standi. However, there would have to be clearer words than 'may' to close the door to an advocate and solicitor (see para 24).

(5) (per **Heliliah FCJ**) The approach of the defendant in interpreting one legislation so as to create a precedent for purposes of interpreting another legislation was untenable as the legislations relied upon were not in pari materia. Each legislation has its own scheme adopted for the purposes to be attained. The issue of legal representation has to be ascertained from the exact provisions found in each legislation (see paras 28 & 31).

(6) (per **Heliliah FCJ**) The word 'may' in the context of s 35 of the Act is to be construed as directory in nature. Thus the appellant like any other body corporate, could appoint private solicitors when it institutes or defends itself in civil proceedings. It also retained the discretion to be represented by a federal counsel authorised by the attorney general or by one of its officers authorised by its chairman or deputy chairman (see para 31).

[Bahasa Malaysia summary

Plaintif adalah sebuah badan korporat yang ditubuhkan di bawah Akta Perbadanan Kemajuan Kraftangan Malaysia 1979 ('Akta'). Plaintif telah menggunakan khidmat Messrs Zain & Co ('Zain') untuk bertindak bagi pihaknya dalam tindakan sivil dan prosiding berkaitan terhadap defendan. Dalam permohonan yang dipertikaikan, peguam defendan membantah representasi Zain atas dasar bahawa Zain tiada locus standi untuk bertindak sebagai peguam cara plaintif menurut s 35 Akta. Bantahan itu telah ditolak oleh Mahkamah Tinggi tetapi dikekalkan oleh Mahkamah Rayuan. Perayu telah diberikan kebenaran untuk merayu ke Mahkamah Persekutuan. Mahkamah Persekutuan telah mentafsirkan s 35 Akta bagi tujuan menentukan sama ada plaintif boleh melantik peguam cara persendirian untuk bertindak bagi pihaknya dalam prosiding sivil.

Diputuskan, membenarkan rayuan dengan kos:

(1) (oleh **Zaki Azmi Ketua Hakim Negara**) Plaintif yang merupakan badan korporat perlu diwakili oleh seorang individu. Seksyen 35 Akta disusun kata-katanya dengan cara sedemikian bagi membolehkan atau memberi kuasa kepada pegawai peguam negara, seperti peguam persekutuan untuk mewakili plaintif dalam apa-apa litigasi sivil. Tanpa peruntukan sebegini, peguam negara atau pegawai-pegawainya tidak mempunyai kuasa berbuat sedemikian (lihat perenggan 4).

(2) (oleh **Heliliah HMP**) Mahkamah Persekutuan tidak bersetuju bahawa dalam konteks mentafsirkan s 35 Akta, bantuan hanya boleh dibuat terhadap 'intention of the legislation' bagi tujuan menanggap pentafsirannya. Seksyen 35 adalah satu-satunya peruntukan yang mengutarakan isu representasi sah dalam prosiding sivil untuk, atau terhadap plaintif. Peruntukan-peruntukan lain Akta memperincikan

atau memperluaskan kuasa-kuasa plaintif untuk mencapai tujuan dan maksud yang mana ia telah ditubuhkan (lihat perenggan 11–14); *Pinner v Everett* [1969] 1 WLR 1266 diikut; *Vengadasalam v Khor Soo Weng & Ors* [1985] 2 MLJ 449 (MA); *Kumpulan Kamuning Sdn Bhd v Rajoo and 200 Others* [1983] 2 MLJ 400 (MP) dan *Navaradnam v Suppiah Chettiar* [1973] 1 MLJ 173 dirujuk.

(3) (oleh **Heliliah HMP**) Dalam rayuan ini, penekanan yang berlebih-lebih diletakkan terhadap perkataan 'may' dalam s 35 Akta dan istilah 'intention of the legislation' manakala kurang perhatian diberikan terhadap kata-kata pembuka 'notwithstanding the provisions of any other written law' yang juga mengawal pemakaian s 35. Istilah 'notwithstanding' secara amnya bermaksud 'not to stand against it', atau 'in the way' atau 'overriding'. Wujud juga keperluan untuk membaca s 35 Akta Profesyen Undang-Undang 1976 dan mengambilkira perkataan-perkataan 'subject to this Act and any other written law' di dalamnya. Perkataan-perkataan 'subject to' dan 'notwithstanding' tidak patut ditafsirkan secara *in vacuo* dalam kes ini (lihat perenggan 17, 20 & 23); *Union of India v IC Lala* (1973) 2 SCC 72; *Government of the Federation of Malaya v Surinder Singh Kanda* [1961] MLJ 121 dan *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72 dirujuk.

(4) (oleh **Heliliah HMP**) Seksyen 35 Akta ialah seksyen yang amat spesifik untuk membolehkan dua kategori individu hadir bagi pihak plaintif dalam prosiding sivil tetapi tanpa mengenakan apa-apa penggantungan ke atas peguam bela dan peguam cara untuk hadir bagi pihak plaintif. Walaupun plaintif boleh menggunakan kedua-dua kategori individu untuk hadir bagi pihaknya, ia tidak dihalang, daripada melantik khidmat mana-mana peguam bela dan peguam cara. Seksyen 35 Akta mempunyai kesan memperluaskan khidmat jabatan peguam negara dan memudahkan pegawai plaintif untuk hadir bagi pihaknya. Tanpa s 35 kedua-dua kategori pegawai itu tidak mempunyai locus standi. Walau bagaimanapun, terdapat perkataan-perkataan yang lebih jelas daripada 'may' untuk menutup pintu kepada peguam bela dan peguam cara (lihat perenggan 24).

(5) (oleh **Heliliah HMP**) Pendekatan defendan dalam mentafsirkan suatu perundangan sehingga membentuk duluan bagi tujuan mentafsir perundangan yang lain tidak dapat dipertahankan kerana perundangan-perundangan yang dirujuk bukan pari materia. Setiap perundangan mempunyai skim tersendiri yang digunakan bagi tujuan yang ingin dicapai. Isu representasi sah perlu ditentukan daripada peruntukan yang tepat didapati dalam setiap perundangan (lihat perenggan 28 & 31).

(6) (oleh **Heliliah HMP**) Perkataan 'may' dalam konteks s 35 Akta hendaklah ditafsirkan sebagai bersifat arahan. Oleh itu perayu sepertimana badan korporat lain, boleh melantik peguam cara persendirian apabila ia memulakan atau membela dirinya dalam prosiding sivil. Ia juga boleh mengekalkan budi bicara untuk diwakili oleh peguam persekutuan yang diberi kuasa oleh peguam negara atau oleh salah seorang daripada pegawainya yang diberi kuasa oleh pengerusi atau timbalan pengerusinya (lihat perenggan 31).]

Notes

For cases on literal approach, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1884–1910.

For cases on right of audience, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1784–1796.

Cases referred to

Government of the Federation of Malaya v Surinder Singh Kanda [1961] MLJ 121, CA (refd)

Ke Ka Tong Sdn Bhd v Datuk Bandar Kuala Lumpur [2008] 3 MLJ 234; [2008] 2 CLJ 225, CA (refd)

Kumpulan Kamuning Sdn Bhd v Rajoo and 200 Others [1983] 2 MLJ 400, FC (refd)

Navaradnam v Suppiah Chettiar [1973] 1 MLJ 173, FC (refd)

Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72, FC (refd)

Thanimalai & The Government of Malaysia v Lee Ngo Yew [1975] 1 MLJ 125, FC (refd)

Vengadasalam v Khor Soo Weng & Ors [1985] 2 MLJ 449, SC (refd)

Legislation referred to

Employees Provident Fund Act 1991 s 14

Federal Constitution art 145(2)

Government Proceedings Act 1956 s 24

Labuan Offshore Financial Services Authority Act 1996 s 36A

Legal Profession Act 1976 s 35, 35(1), (2)

Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994 s 38

Local Government Act 1976 ss 148, 151, Form F

Majlis Amanah Rakyat Act 1966 ss 23, 35

Perbadanan Kemajuan Kraftangan Malaysia Act 1979 ss 3, 35, 35(a), (b)

Perbadanan Putrajaya Act 1995 s 28

Appeal from: Civil Appeal No W-02–1061 of 2006 (Court of Appeal, Putrajaya)

Amer Hamzah Arshad (M Rubini with him) (Zain & Co) for the appellant.
R Kamalanathan (Vinod R Kamalanathan with him) (Vinod Kamalanathan & Associates) for the respondent.
See Mee Chun (Senior Federal Counsel, Attorney General's Chambers) for the intervener.

Zaki Azmi Chief Justice:

[1] I had the privilege of reading through the grounds of judgment of my learned sister Heliliah Mohd Yusof FCJ in draft. I agree with her reasoning and her conclusion. However I would like to add a further reasoning to support that judgment.

[2] I do not need to deal with the backgrounds and the facts again as they are well spelled out in her grounds.

[3] The impugned s 35 of the Perbadanan Kemajuan Kraftangan Malaysia Act 1979 ('PKKM Act') is worded in a way it is done to enable or empower an officer of the attorney general ie a federal counsel to represent the Perbadanan Kemajuan Kraftangan Malaysia ('the Perbadanan') in any litigation.

> 35 Civil proceedings
>
> Notwithstanding the provisions of any other written law —
>
> (a) any person holding the appointment of Federal Counsel and authorized by the Attorney-General for the purpose; or
>
> (b) any officer of the Perbadanan authorized by the Chairman or Deputy Chairman of the Perbadanan for the purpose,
>
> may institute any civil proceedings on behalf of the Perbadanan or a subsidiary corporation and may, on behalf of the Perbadanan or a subsidiary corporation, appear in and conduct any such proceedings by or against the Perbadanan or the subsidiary corporation and make and do all appearances, acts, and applications in respect of such proceedings.

Without such provision, the attorney general or his officers would not have the authority to do so. The attorney general derives his powers from art 145(2) of the Federal Constitution ('FC').

> Article 145 Attorney General
>
> (1) The Yang di-Pertuan Agong shall, on the advice of the Prime Minister, appoint a person who is qualified to be a judge of the Federal Court to be the Attorney General for the Federation.

(2) It shall be the duty of the Attorney General to advise the Yang di-Pertuan Agong or the Cabinet or any Minister upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Yang di-Pertuan Agong or the Cabinet, and to discharge the functions conferred on him by or under this Constitution or any other written law.

(3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

(3A)Federal law may confer on the Attorney General power to determine the courts in which or the venue at which any proceedings which he has power under Clause (3) to institute shall be instituted or to which such proceedings shall be transferred.

(4) In the performance of his duties the Attorney General shall have the right of audience in, and shall take precedence over any other person appearing before, any court or tribunal in the Federation.

(5) Subject to Clause (6), the Attorney General shall hold office during the pleasure of the Yang di-Pertuan Agong and may at any time resign his office and, unless he is a member of the Cabinet, shall receive such remuneration as the Yang di-Pertuan Agong may determine.

(6) The person holding the office of Attorney General immediately prior to the coming into operation of this Article shall continue to hold the office on terms and conditions not less favourable than those applicable to him immediately before such coming into operation and shall not be removed from office except on the like grounds and in the like manner as a judge of the Federal Court.

Article 145(2) provides that it is the duty of the attorney general to, inter alia, discharge the functions conferred on him by any written law. It is pursuant to this power that s 35 of the PKKM Act was enacted.

[4] The Perbadanan is a body corporate and by its nature has to be represented by an individual person in accordance with s 3 of the PKKM Act:

3 Establishment of the Perbadanan Kemajuan Kraftangan Malaysia

(1) There shall be established a corporation by the name of 'Perbadanan Kemajuan Kraftangan Malaysia' which shall have perpetual succession and a common seal and which may sue and be sued in the said name and, subject to and for the purposes of this Act, may enter into contracts and hold and deal in or with any movable or immovable property and do all other matters and things incidental or appertaining to a body corporate.

(2) Upon the commencement of this Act, the corporation known as 'Lembaga Kraftangan Malaysia' established by the Majlis Amanah Rakyat (Lembaga Kraftangan Malaysia) Order 1973 shall be known as the Perbadanan Kemajuan Kraftangan Malaysia, shall be deemed to be the corporation

established under subsection (1), and shall cease to be regarded as a corporation established by the Majlis Amanah Rakyat under section 25 of the Majlis Amanah Rakyat Act 1966.

Section 35(1) of the Legal Profession Act 1976 permits an advocate and solicitor to appear on its behalf.

35 Right of advocate and solicitor

(1) Any advocate and solicitor shall, subject to this Act and any other written law, have the exclusive right to appear and plead in all Courts of Justice in Malaysia according to the law in force in those Courts; and as between themselves shall have the same rights and privileges without differentiation.

However, the legislators deem fit that a federal counsel authorised by the attorney general should also be permitted to represent the Perbadanan in any civil proceedings by or against the Perbadanan. Hence, without the said s 35 of the PKKM Act, such an officer will not be able to do so.

[5] I therefore answer the question (i) in the negative and question (ii) in the affirmative. The appeal is therefore allowed with costs. Deposit to be refunded to the appellant. The order of the Court of Appeal is set aside and the order of the High Court is restored. This case is remitted to the High Court for the continuation of the proceedings.

Heliliah FCJ:

[6] This appeal raises an issue of interpretation. We became seized of the appeal following this court granting the appellant leave to appeal against the decision of the Court of Appeal leaning in favour of the respondent. The chronology of events as found in the judgment of that court is the following and the appellant and respondent will be referred to as the plaintiff and defendant respectively.

[7] The plaintiff is a body corporate established under the Perbadanan Kemajuan Kraftangan Malaysia Act 1979 ('PKKM Act 1979'). On 4 March 2005 the plaintiff obtained a judgment against the defendant, being a tenant of the plaintiff, to deliver vacant possession of premises rented out by the plaintiff to the defendant. The defendant who was also injuncted from entering the premises filed an application to set aside the judgment and obtained an ex parte interim order for stay of execution. This prompted the plaintiff to file an application to set aside the ex parte order.

[8] In the course of the hearing of the aforesaid applications before the trial judge the defendant raised a preliminary objection pertaining to Messrs Zain

& Co being engaged to represent the plaintiff on the basis that Messrs Zain & Co lacked locus standi to act as solicitors for the plaintiff in view of s 35 of Act 1979. The objection which was overruled by the High Court was however sustained by the Court of Appeal. At the outset of the appeal proper before us a senior federal counsel from the attorney general's applied to act as an intervener and which application we allowed.

[9] The appeal pivots on a question of law namely the interpretation to be given to s 35 of the PKKM Act 1979. As submitted before us the question that is required to be addressed is:

> Section 35 states
>
> 35 Civil Proceedings
>
> *Notwithstanding the provisions of any other written law —*
>
> (a) any person holding the appointment of Federal Counsel and authorised by the Attorney General for the purpose; or
>
> (b) any officer of the Perbadanan authorised by the Chairman or Deputy Chairman of the Perbadanan for the purpose,
>
> *May* institute any civil proceedings on behalf of the Perbadanan or a subsidiary corporation and *may*, on behalf of the Perbadanan or a subsidiary corporation, appear in and conduct any such proceedings by or against the Perbadanan or the subsidiary corporation and make and do all appearances, acts and applications in respect of such proceedings.

whether that section means one of the following:

(i) That the Appellant/Plaintiff being a body corporate can only be represented in a civil proceeding by either a person holding the appointment of a Federal Counsel and authorised by the Attorney General for the purpose; or any officer of the Perbadanan authorised by the Chairman or Deputy Chairman of the Perbadanan for the purpose; or

(ii) That the Appellant/Plaintiff, like any other body corporate, may appoint a firm of private solicitors when it decides to either institute or defend itself in any civil proceedings but over and above this general principle retains its discretion to appoint the persons as stated in (i) above should it deem necessary in the circumstances to either institute or defend itself in a civil proceeding.

[10] Before the Court of Appeal the defendant succeeded, premised on the decision that the plaintiff is a body corporate and having regard to the general scheme of the PKKM Act 1979, the proper construction to be given to the word 'may' in s 35 must mean 'shall' and consequentially the plaintiff has no power to appoint solicitors to conduct or institute a legal proceeding on its behalf. The plaintiff has, according to the Court of Appeal, to rely on the services of a counsel as authorised by the attorney general or the plaintiff's

own officers as authorised by its chairman or deputy chairman. Understandably the attorney general's office in supporting the appeal of the plaintiff has contended, inter alia, that if this interpretation is to prevail it would render that office to be inundated with all sorts of civil litigation processes. It would appear from the judgment of the Court of Appeal a deduction has been made that from a reading of s 35 and 'other provisions' of the PKKM Act 1979 proceedings by or against the plaintiff can only be instituted and proceeded with either by a federal counsel authorised by the attorney general for that purpose or the plaintiff's officer authorised by the chairman or deputy chairman. However a careful scrutiny of the alleged 'other provisions' do not throw any further light on the converse, namely whether that very section precludes the plaintiff categorically to engage a firm of solicitors to institute proceedings on its behalf. If so it would then be compelling upon the plaintiff to have among its officers legally qualified persons to conduct proceedings on its behalf. However to concede to such a situation would be paying less regard to certain opening words in that very section namely the words 'Notwithstanding the provisions of any other written law …'

[11] We do not agree that in the context of interpreting s 35 of Act 1979 recourse need only be made to what is termed as the 'intention of the legislature' in order to discern its interpretation. In the context of this appeal s 35 is the only provision that addresses the issue of legal representation in respect of civil proceedings to be conducted for or against the plaintiff. The other provisions of the PKKM Act 1979 elaborate or expand on powers of the plaintiff to attain the objects and purposes for which it has been established as a statutory body.

[12] It is salutary to bear in mind the following on statutory interpretation as it is stated in *Halsbury's Laws of England* (4th Ed) Vol 36 para 585:

> If there is nothing to modify, nothing to alter, nothing to qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning.

[13] Lord Reid has expressed the plain meaning rule thus:

> In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some possible of the word or phrase. — *Pinner v Everett* [1969] 1 WLR 1266 at p 1273.

[14] The approach applied by Lord Reid has also been adopted in *Vengadasalam v Khor Soo Weng & Ors* [1985] 2 MLJ 449 (SC); *Kumpulan Kamuning Sdn Bhd v Rajoo and 200 Others* [1983] 2 MLJ 400 (FC); *Navaradnam v Suppiah Chettiar* [1973] 1 MLJ 173.

[15] In the context of s 35 of the PKKM Act 1979 counsel for the defendant would want us to accept that the word 'may' carries the interpretation 'must'. There is an analysis drawn from the decision of the Court of Appeal in *Ke Ka Tong Sdn Bhd v Datuk Bandar Kuala Lumpur* [2008] 3 MLJ 234; [2008] 2 CLJ 225 where the word 'may' has been interpreted to mean something obligatory in requiring compliance with the enforcement of provisions relating to the collection of assessment taxes and warrant penalties. In that case two provisions were being read together that is ss 148 and 151 of the Local Government Act 1976. It was decided that in order for the local authority to apply to the High Court for the recovery of arrears of assessment taxes it has to show that it has exhausted the mechanism as provided in s 148 including the service of a Form F for the recovery of the arrears. It is in that context that the provisions of s 148 that stipulates, inter alia, 'For the recovery of an arrear the local authority *may* issue a warrant of attachment in Form F' is not interpreted as permissive as in construing s 151 that stipulates, inter alia, 'If the arrears cannot be recovered in the manner provided in section 148 …' the local authority has to satisfy the requirement of first having issued a form for the purposes of a warrant of attachment that may be in Form F under the said s 148. It is akin to a prerequisite. This is a principle of harmonious interpretation applicable in construing the provisions of the Local Government Act 1976.

[16] *Thanimalai & The Government of Malaysia v Lee Ngo Yew* [1975] 1 MLJ 125 also illustrates the context in which the term 'may' is intended to be directory. This is to be found in the judgment of Lee Hun Hoe CJ (Borneo) and read out by Suffian LP:

> The liability of the government for actionable tort is thus created by statute. Section 5 of the 1956 Ordinance prescribing liability in tort reads:
>
> > ... Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person is liable for any wrongful act done, or any neglect or default committed by his agent ...

Section 16 of the 1956 Ordinance is concerned with civil proceedings in the High Court. The controversy really centres round ss 17 and 41 which deal with the civil proceedings in the sessions court and the special order which the Yang Dipertuan Agong may make respectively. They read as follows:

> 17(1) Subject to the provision of this Ordinance, and of any written law limiting the jurisdiction of a Sessions Court (whether by reference to the subject

matter of the proceedings to be brought or the amount sought to be recovered in the proceedings or otherwise) any proceedings against the Government *may be* instituted in a Sessions Court.

(2) Any proceedings by or against the Government in a Sessions Court shall be instituted and proceeded with in accordance with the provisions of this Ordinance and not otherwise.

41(1) The Yang Dipertuan Agung may by order make such provision as appears to him to be expedient with respect to civil proceedings by or against the Government in any court not being the High Court or a Sessions Court.

(2) An order made under this section may in particular —

(a) define the jurisdiction of the court to which the order relates in civil proceedings by or against the Government; and

(b) apply, in relation to civil proceedings by or against the Government in the said court, any provisions of this Ordinance which would not otherwise apply in relation to those proceedings with such additions, exceptions and modifications as appear to the Yang Dipertuan Agung to be expedient.

The contention of the appellants is that the provisions of ss 16, 17 and 41 show clearly that proceedings by or against the government could only be instituted and proceeded with in either the High Court or sessions court but that it could also be instituted in the magistrate's court if the Yang Dipertuan Agong makes a special order conferring jurisdiction on that court. No such order has been made.

The learned judge stated that s 17 did not prohibit the filing of an action in the magistrate's court because the word 'may' is used in the section and not 'shall'. Appellants contended that the learned judge was wrong because on the proper construction of the word 'may' in the section should be construed as 'shall'. *The question whether the Legislature intends a particular provision to be mandatory or directory must in each case depend upon the scope and object of the particular statute or enactment*. Further, we would have to look at the general scheme of the statute or enactment and its express provisions. Sometimes, the word 'may' in a statute or enactment is given an imperative meaning. Thus, in *Alderman Backwell*'s case the words in an Act of Parliament that the chancellor may grant a commission has been held to convey the imperative meaning of must. Wherever a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as 'shall'. Thus, where a statute says that the sheriff 'may' take bail, it is construed to mean 'shall' for he is compellable to do so. *Rex & Regina v Barlow*. Having regard to the general scheme of the Government Proceedings Ordinance 1956, it is quite clear that a duty is cast upon the sessions court so that on a proper construction the word 'may' in s 17 must be construed to mean 'shall'.

Reading together particularly ss 16, 17 and 41 of the 1956 Ordinance, it seems the intention of the Legislature is clear. That is, proceedings by or against the government can only be instituted and proceeded in either the High Court or sessions court 'in accordance with the provisions of this

A Ordinance *and not otherwise*'. Stress is made on the words italicised. However, proceedings by or against Government can also be instituted or proceeded in any other court if the Yang Dipertuan Agong makes a special order under s 41 conferring jurisdiction on that court if it appears to him to be expedient to do so. Since no such special order has been made proceedings by or against the government can only be brought in either the High Court B or sessions court. (Emphasis added.)

[17] In the instant appeal there is only one section. Nevertheless while undue emphasis has been emplaced on the word 'may' in s 35 of the PKKM C Act 1979 and the term 'intention of the legislation', scant regard has been paid to the opening words that also govern the application of the rest of that provision. The words that require to be addressed are:

Notwithstanding the provisions of any other written law

D

[18] The words above would encompass certain legislation relevant to the issue in this appeal. The plaintiff's counsel has referred us to the following:

(a) Advocates and Solicitors Ordinance 1947 or Ordinance 1947 s 55 E (replaced by the Legal Profession Act 1976 in so far that Act as in force in Peninsular Malaysia).

(b) Legal Profession Act 1976 or the LPA 1976 ss 35(1) and (2):

35 Right of Advocate and Solicitor

F

(1) Any advocate and solicitor shall, *subject to this Act and any other written law*, have the exclusive right to appear and plead in all Courts of Justice in Malaysia according to the law in force in those Courts; and as between themselves shall have the same rights and privileges without differentiation.

G (2) Nothing herein contained shall affect the right which is hereby declared off —

(a) legal officers, whose duties so require them to do, and qualified persons appointed temporarily to perform the duties of legal officers to appear and H plead on behalf of the Government in the Courts;

(b) ...

(ba) ...

(c) ...

I

(3) The Rules of the High Court 1980 O 5 r 6(2):

6 Right to sue in person (O 5 r 6)

(1) ...

(2) *Except as expressly provided by or under any written law*, a body corporate may not begin or carry on any such proceedings otherwise than by a solicitor.

[19] The inception of the LPA 1976 has preceded the PKKM Act 1979 and is a general enabling legislation establishing the right of an advocate and solicitor to appear and plead in all courts of justice in Malaysia. Section 35(2) of the LPA 1976 is also a specific statutory recognition of the right of legal officers and qualified persons appointed temporarily to perform the duties of legal officers to appear on behalf of the Government of Malaysia, concomitant with the right of an advocate and solicitor in Malaysia. Section 35(2) of the LPA 1976 is also in consonance with the provision of s 24 of the Government Proceedings Act 1956 which prior to the LPA 1976 has also enabled certain categories of officers of the attorney general's chambers to appear on behalf of the government. In addition, in civil proceedings when duly retained by the attorney general it is permissible for an advocate and solicitor to appear on behalf of the Government of Malaysia.

[20] Before reverting to consider s 35 of the PKKM Act 1979 it is provided in s 35 of the LPA 1976 that the exclusive right of an advocate and solicitor to appear in all courts of justice in Malaysia is *subject to the Act 1976 itself as well as any other written law*. This could be read with s 35 of Act 1979 which as indicated earlier begins with the words 'Notwithstanding ...'. The term 'notwithstanding' means generally 'not to stand against it', or 'in the way' or overriding.

> The words notwithstanding anything contained in the Code of Criminal Procedure found at the beginning of s 5A(1) of the Prevention of Corruption Act 1947 (now s 17 of the Prevention of Corruption Act 1988) merely carve out a limited exemption from the provisions of the Code of Criminal Procedure in so far as they limit the class of persons who are competent to investigate offences mentioned in the section and to arrest without warrant. It does not mean that the whole of the Code of Criminal Procedure, ... is made inapplicable — *Union of India v IC Lala* (1973) 2 SCC 72 at p 77.

[21] There is also need to consider the words 'subject to this Act and any other written law' in s 35 of the LPA 1976. These words and their significance have been given judicial consideration in *Government of the Federation of Malaya v Surinder Singh Kanda* [1961] MLJ 121 at p 138:

> To test the conclusion to which I have come by following the method of approach adopted by the attorney general in his argument and endeavouring to give to the words, 'subject to,' their ordinary meaning, I have searched — and I hope diligently — the various authorities in which the words, 'subject to,' have been the subject of construction by the courts. The attorney general was content to rely upon one small quotation from an American work in which words and phrases judicially interpreted in America have been brought together under the appropriate

A headings. He relied upon one quotation only. Apart altogether from the inadvisability of relying upon an American work, a checking of the actual pages dealing with the phrase, 'subject to,' shows that the courts in America (without checking in detail) have given many and varied interpretation to the phrase: one might almost say as many if not more has been given to them in the courts of the B British Commonwealth. My research in the law reports and text books of the British Commonwealth has shown that the courts have given to the words, 'subject to', not one meaning but varied meanings. They range from the words, 'subject to', having the effect of the words following it negativing the statement preceding it as is particularly to be noticed in the long line of authorities dealing with the phrase, C 'subject to contract', 'subject to lease', etc. This particular meaning of the phrase, 'subject to', was referred to by Stout CJ in the New Zealand case of *Benge & Pratt v Guardian Assurance Company* when he said, 'subject to' must mean from that point of view 'swallowed up' or 'negatived by'. The meanings in the various authorities in the British Commonwealth go to the other extreme in limiting their D effect as did Denman CJ, in *Rex v Churchwardens of St James*, Westminster when he said, 'The language is not entirely free from doubt; but, considering that a certain custom had long prevailed without question, the phrase, 'subject to the laws and statutes now in force', must be taken as a description of the existing practice.' This diversity of meaning and the need to consider the entire document are E emphasised when we note in two decisions of the Privy Council one year apart the judgment of the same Law Lord, Lord Simonds, where the words, 'subject to', are given the contradictory meanings of 'without prejudice to' that is to say with no restriction on what is being qualified and 'the words subject to ... are naturally words of restriction'. The two cases I refer to are *Smith v London Transport Executive* F and *Akistan Apena of Iporo v Akinwande Thomas*. Remembering the words of Maugham J in *In re Dunkley v Sullivan* where he held that the words, 'subject to the provisions contained in the will', must mean 'subject to all the provisions of the will which remain operative and effective', I have come to the conclusion that the meaning which reading the Constitution as an entirety and having regard to the consideration of what is happening on the granting of a fresh Constitution, I ought G to give to the words, 'subject to,' is following Denman CJ 'Subject to the procedural limitations of', or alternatively to follows the wording of Lord Simonds in *Smith*'s case and to say the jurisdiction is given to be exercised 'within the restrictions or limitations imposed by', and this meaning is well within the limits of the range of meanings given to the words, 'subject to', by the courts throughout H the British Commonwealth; ...

[22] In *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72 at p 95 Mohamad Dzaiddin FCJ (as he then was) referred to the judgment I of Neal J in *Surinder Singh Kanda*'s case, in the following terms:

> Datuk Foo laid stress on the words 'subject to' by relying on the judgment of Neal J in *Government of the Federation of Malaya v Surinder Singh Kanda* [1961] MLJ 121 at p 138:

> To test the conclusion to which I have come by following the method of approach adopted by the attorney general in his argument and endeavouring to give to the words, 'subject to', their ordinary meaning ... 'subject to' must mean from that point of view 'swallowed up' or 'negative by'.

[23] Yet s 35 of the PKKM Act 1979 contains the words 'notwithstanding'. Bearing in mind that the words 'subject to' and 'notwithstanding' are not to be interpreted *in vacuo* the question to be posed is how is the word 'may' in the context of s 35 of the Act 1979 to be construed.

[24] Is this to be construed as whittling down the right to represent the plaintiff in civil proceedings to only two categories of persons as specified in paras (a) and (b) of s 35 of Act 1979? Our response would be in the negative for the simple reason that the word used in that section is 'may'. In our view this is a very specific section that enables the two categories of persons to appear on behalf of the plaintiff in civil proceedings but without imposing any interdiction on an advocate and solicitor to appear on behalf of the plaintiff. The converse would be that whilst the plaintiff could resort to the two categories of persons to appear on its behalf it is not precluded, if it so wishes, to engage the services of any advocate and solicitor. This is also an occasion to apply a harmonious interpretation where the provisions are interlinked as s 35 of the PKKM Act 1979 speaks about persons who not only initiate civil proceedings but also make appearances for the plaintiff. Thus s 35 of the PKKM Act 1979 have both the effect of expanding the services of the office of the attorney general and facilitating an officer of the plaintiff to appear on its behalf. Without s 35 the two categories of officers would in effect be the categories of persons that would have no locus standi. Nevertheless there would have to be clearer words than the word 'may' to close the door to an advocate and solicitor.

[25] A comparison has been made with certain provisions found in two legislation also dealing with statutory bodies like the plaintiff. The legislation are the Majlis Amanah Rakyat Act 1966 and the Employees Provident Fund Act 1991. In both these legislation there are provisions that are allegedly in support of the defendant's stance.

[26] The provisions are as follows:

(a) Majlis Amanah Rakyat Act 1966 (Act 489)

(i) Power to employ agents

23 The Majlis may employ and pay agents and technical advisers including advocates and solicitors, bankers, stockbrokers, surveyors or valuers or other

persons, to transact any business or to do any act required to be transacted or done in the execution of its duties or for the better carrying into effect the purposes of this Act.

(ii) Civil Proceedings

35 Notwithstanding any written law, in any civil proceedings by or against the Majlis or any corporation —

(a) any person holding the appointment of a Federal Counsel and authorized by the Attorney General for the purpose; or

(b) any officer of the Majlis authorized in that behalf by special or general directions of the Chairman,

may, on behalf of the Majlis or the corporation, as the case may be, institute, appear in and conduct such proceedings and may make and do all appearances, acts and application in respect of such proceedings.

(b) Employee Provident Fund Act 1991 (Act 452)

(i) Powers and duties of the Board

14(3) The Board may employ and pay agents, advocates and solicitors, bankers, stockbrokers or any other persons, to transact any business or do any act required to be transacted or done in the exercise of its powers or in the carrying out of its duties or for the better carrying into effect of the purposes of this Act.

(ii) Civil proceedings to recover contributions

65(2) Proceedings for the summary recovery as civil debts of contributions may be instituted by any officer authorized in that behalf by special or general directions of the Chairman and any such officer may conduct such proceedings.

[27] It is the contention of counsel for the defendant that the abovementioned provisions are to be read together and hence there has to be an equipollent provision to ss 23 and 14 respectively (as specified above) in the PKKM 1979 Act before the plaintiff is enabled to have an advocates and appear on its behalf.

[28] This line of interpreting one legislation so as to create a precedent for purposes of interpreting another legislation is untenable as the legislation relied upon are not in pari materia. The provisions in Acts 489 and 452 mentioned above operate for purposes specific to the scheme of each legislation. As *Cross: Statutory Interpretation* (2nd Ed, 1987) at p 38 said:

> A decision on the interpretation of one statute generally cannot constitute a binding precedent with regard to the interpretation of another statute.

[29] However in s 35 of Act 489 the common vein found is still the introductory words 'Notwithstanding any written law, in any civil proceedings ...'

[30] A brief perusal of the legislation establishing various statutory corporation reveals that each legislation has its own scheme adopted for the purposes to be attained. Examples are:

(a) Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994 (Act 520). It includes s 38 which relates only to the conduct of prosecution by its officers.

(b) Labuan Offshore Financial Services Authority Act 1996 (Act 536)

> 36A
>
> (1) Notwithstanding the provisions of any other written law —
>
> (a) in any civil proceedings by or against the Authority; or
>
> (b) in any other civil proceedings in which the Authority is required or permitted by the court to be represented or to be heard, or is otherwise entitled to be represented or to be heard,
>
> any member, officer or employee of the Authority who has been admitted as an advocate and solicitor under the Legal Profession Act 1976 [Act 166] and authorized by the Authority for the purpose, *may*, on behalf of the Authority, institute such proceedings or appear as an advocate therein and may make and do all acts in respect of such proceedings on behalf of the Authority.
>
> (2) Notwithstanding any provision to the contrary in this Act, the Authority may appoint an advocate and solicitor for the purpose provided in subsection (1).

(c) Perbadanan Putrajaya Act 1995 (Act 545)

> 28 The Perbadanan *may* employ and pay agents and technical advisers, including advocates and solicitors, bankers, stockbrokers, surveyors, valuers and other persons, to transact any business or to do any act required to be transacted or done in the performance of its functions, the exercise of its powers or the discharge of its duties or for the better carrying into effect the purposes of this Act.

[31] It is noted from the above the issue of legal representative will need to be ascertained from the exact provisions found in each legislation. The comparative analysis reinforces our conclusion that the word 'may' in its context in s 35 of the PKKM Act 1979 is to be construed as directory in nature. In response to the question posed to us, the correct position is as crafted in para (ii) and not para (i).

A **[32]** This appeal is therefore allowed with costs with the deposit refunded to the appellant. The order of the Court of Appeal is set aside. The order of the High Court is restored. The matter is to be remitted to the High Court for the proceedings on the applications.

B *Appeal allowed with costs.*

Reported by Andrew Christopher Simon

C

D

E

F

G

H

I